## RHB BANK BHD v. DATO' HJ MUHAMMAD HAMZAH

FEDERAL COURT, PUTRAJAYA
AHMAD MAAROP PCA
RAMLY ALI FCJ
ALIZATUL KHAIR OSMAN FCJ
ROHANA YUSUF FCJ
MOHD ZAWAWI SALLEH FCJ
[CIVIL APPEAL NO: 02(i)-123-12-2018(B)]
21 OCTOBER 2019

***LIMITATION:*** *Land – Auction – Borrower defaulted in repayment of credit facilities granted by bank – Bank obtained order for sale of land charged as security – Application by bank to fix auction for sale of land after series of failures to auction land – Whether limitation set in – Whether limitation applied to bar application by bank to fix new auction date and reserve price for land – Whether order for sale of land 'judgment' – Limitation Act 1953, ss. 2(1), 6(3) & 21(1)*

***LAND LAW:*** *Charge – Auction – Borrower defaulted in repayment of credit facilities granted by bank – Bank obtained order for sale of land charged as security – Application by bank to fix auction for sale of land after series of failures to auction land – Bank filed application to fix auction for sale of land – Whether limitation set in – Limitation Act 1953, ss. 2(1), 6(3) & 21(1)*

***STATUTORY INTERPRETATION:*** *'action' – Limitation Act 1953, s. 2(1) – Whether 'action' means fresh action – Whether applies to application to auction property or to fix date of auction*

Bank Utama (M) Bhd had granted credit facilities to the respondent ('defendant') to finance the purchase of a piece of land. As security, the land was charged to Bank Utama (M) Bhd ('the charge'). However, the defendant defaulted in the repayment. When Bank Utama (M) Bhd was merged or acquired by the appellant ('plaintiff'), the plaintiff undertook the recovery action, by filing originating summons in 2001 and successfully obtaining an order for sale in 2002. Numerous attempts to auction the land failed; they were either aborted due to lack of bidders or were called off due to various applications by the defendant. In 2017, the plaintiff filed an application, at the High Court, to fix an auction for the sale of the land. The defendant filed an application to restrain further auction and for a perpetual injunction to prevent the plaintiff from recovering any debts owed by him or to enforce the charge on the ground that the limitation period had set in. The Deputy Registrar dismissed the defendant's application and fixed a new date but this date was aborted as there were no bidders. The High Court Judge dismissed the defendant's appeal against the Deputy Registrar's decision. The Court of Appeal, in allowing the defendant's appeal, held that (i) based on the

definition of the word 'action' in s. 2(1) of the Limitation Act 1953 ('Act'), s. 21(1) of the same Act applied to the plaintiff's action to auction the land; and (ii) the plaintiff's action was caught by s. 6(3) of the Act. Hence, the present appeal. The questions that arose for adjudication were: (i) where a land has been charged pursuant to the National Land Code ('NLC'), whether limitation, in particular ss. 6(3) and 21(1) of the Act, applies to bar an application by a chargee to fix a new auction date and reserve price for the charged land; and (ii) whether an order for sale of land, granted pursuant to the NLC, may be deemed a 'judgment' for the purpose of s. 6(3) of the Act.

**Held (allowing appeal with costs; setting aside decision of Court of Appeal and affirming decision of High Court)**
**Per Alizatul Khair Osman FCJ delivering the judgment of the court:**

**(1)** Based on legal authorities, the word 'action' in s. 2(1) of the Act must mean 'fresh actions' only and does not include applications filed procedurally in pursuance, or in execution, of the order for sale made in the main action. The applications filed to fix new auction dates, as in the present case, were merely consequential proceedings taken to enforce and execute the order for sale and were not fresh actions. Sections 21(1) and 6(3) of the Act are, therefore, not applicable to such applications. (paras 41 & 42)

**(2)** An 'action upon a judgment', in s. 6(3) of the Act means 'fresh action' and not an application to auction a property or to fix a date of auction, as in the present case, as they were merely proceedings to enforce the order for sale. (para 54)

***Bahasa Malaysia*** *Headnotes*

Bank Utama (M) Bhd telah memberikan responden kemudahan pinjaman untuk membiayai belian sebidang tanah. Sebagai cagaran, tanah tersebut dipajakkan pada Bank Utama (M) Bhd ('pajakan'). Walau bagaimanapun, defendan ingkar dalam bayaran semula. Apabila Bank Utama (M) Bhd digabung atau diambil alih oleh perayu ('plaintif'), plaintif memulakan tindakan pemerolehan semula, dengan memfailkan saman pemula pada 2001, dan berjaya memperoleh perintah jualan pada 2002. Beberapa percubaan melelong tanah tersebut tidak berjaya; kesemuanya sama ada dibatalkan kerana tiada pembida atau dibatalkan akibat pelbagai permohonan oleh defendan. Pada 2017, plaintif memfailkan satu permohonan, di Mahkamah Tinggi, untuk menetapkan satu lelongan untuk jualan tanah tersebut. Defendan memfailkan satu permohonan menghalang lelongan lanjut dan satu injunksi berterusan menghalang plaintif memperoleh apa-apa hutang daripadanya atau menguatkuasakan pajakan atas alasan tempoh had masa sudah luput. Timbalan Pendaftar menolak permohonan defendan dan menetapkan tarikh baharu tetapi tarikh ini dibatalkan kerana tiada pembida.

Hakim Mahkamah Tinggi menolak rayuan defendan terhadap keputusan Timbalan Pendaftar. Mahkamah Rayuan, dalam membenarkan rayuan defendan, memutuskan (i) berdasarkan definisi perkataan 'tindakan' dalam s. 2(1) Akta Had Masa 1953 ('Akta'), s. 21(1) Akta yang sama terpakai pada tindakan plaintif untuk melelong tanah; dan (ii) tindakan plaintif terhalang oleh s. 6(3) Akta. Maka timbul rayuan ini. Soalan-soalan yang timbul untuk diputuskan adalah (i) apabila sebidang tanah telah dipajakkan, bawah Kanun Tanah Negara ('KTN'), sama ada had masa, khususnya ss. 6(3) dan 21(1) Akta, terpakai untuk menghalang permohonan oleh pemegang gadaian untuk menetapkan satu tarikh lelongan baharu dan harga simpanan tanah pajakan tersebut; dan (ii) sama ada satu perintah jualan tanah, yang diberi bawah KTN, boleh dianggap 'penghakiman' dalam maksud s. 6(3) Akta.

**Diputuskan (membenarkan rayuan dengan kos; mengetepikan keputusan Mahkamah Rayuan dan mengesahkan keputusan Mahkamah Tinggi)**
**Oleh Alizatul Khair Osman HMP menyampaikan penghakiman mahkamah:**

**(1)** Berdasarkan autoriti undang-undang, perkataan 'tindakan' dalam s. 2(1) Akta semestinya bermaksud 'tindakan baharu' sahaja dan tidak termasuk permohonan-permohonan yang difailkan menurut tatacara untuk, atau demi melaksanakan, perintah jualan yang dibuat dalam tindakan asal. Permohonan-permohonan yang difailkan untuk menetapkan tarikh lelongan, seperti dalam kes ini, sekadar prosiding sampingan yang dimulakan untuk menguatkuasakan dan melaksanakan perintah jualan dan bukan tindakan-tindakan baharu. Seksyen 21(1) dan 6(3) Akta, dengan itu, tidak terpakai pada permohonan-permohonan sedemikian.

**(2)** Satu 'tindakan ke atas apa-apa penghakiman', dalam s. 6(3) Akta bermaksud 'tindakan baharu' dan bukan permohonan melelong hartanah atau menetapkan tarikh lelongan, seperti dalam kes ini, kerana kesemuanya sekadar prosiding menguatkuasakan perintah jualan.

**Case(s) referred to:**
*Chung Khiaw Bank Ltd v. Lau Ah Yen & Anor [1989] 1 CLJ 1065; [1989] 1 CLJ (Rep) 432 HC* ***(refd)***
*Dato' Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad [2011] 1 CLJ 1 FC* ***(refd)***
*Gee Boon Kee & Ors v. Tan Pok Shyong [2018] 1 CLJ 565 FC* ***(refd)***
*Lowsley v. Forbes (t/a LE Design Services) [1998] 3 All ER 897* ***(refd)***
*Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC* ***(refd)***
*Re Lim Ah Hee, ex p Perwira Affin Bank Bhd [2000] 3 CLJ 354 CA* ***(refd)***
*Teh Siew Hua v. Tan Kim Chong [2010] 4 SLR 123* ***(refd)***
*United Overseas Bank (Malaysia) Bhd v. Hanya Satu Tours & Travel Sdn Bhd [2016] 1 LNS 116 HC* ***(refd)***

**Legislation referred to:**
Courts of Judicature Act 1964, s. 78(1)
Limitation Act 1953, ss. 2(1), 6(3), 21(1)
National Land Code, s. 256

Limitation Act (Cap 163) [Sing], s. 6(3)
Limitation Act 1980 [UK], ss. 24(1), 38(1)

*For the appellant - Yoong Sin Min, Heng Chia Leng & Cheah Faan Jin; M/s Shook Lin & Bok*
*For the respondent - HC Tan; M/s HC Tan & Zahani*

*[Editor's note: For the Court of Appeal judgment, please see Dato' Muhammad Hamzah v. RHB Bank Bhd [2018] 1 LNS 1272 (overruled).]*

*Reported by Najib Tamby*

## JUDGMENT

**Alizatul Khair Osman FCJ:**

### Introduction

**[1]** This judgment is prepared and delivered pursuant to s. 78(1) of the Courts of Judicature Act 1964, as Justice Ramly Ali FCJ has since retired. This judgment is therefore the judgment of the remaining members of the panel.

**[2]** This appeal arose out of the decision of the Court of Appeal on 5 July 2018 which had set aside the decision of the High Court dated 8 January 2018.

**[3]** The High Court had dismissed the respondent's (the defendant in the court below) application dated 11 April 2017 for, *inter alia*, a stay of further auctions and a perpetual injunction to prevent the appellant (the plaintiff in the court below) from recovering any debts owed by the respondent or to enforce the appellant's charge on the respondent's land (H.S. (D) 11668, P.T. No. 5301, Mukim Ampang), (the said land) on the ground that limitation has set in.

**[4]** In this judgment, parties are referred to as they were referred to in the court below.

**[5]** Leave was granted by this court on the following questions of law:

(i) Where land has been charged pursuant to the National Land Code, whether limitation, in particular, ss. 21(1) and 6(3) of the Limitation Act 1953, applies to bar an application by the chargee to fix a new auction date and reserve price for the charged land? (Leave question (1))

(ii) Whether an order for sale of land granted pursuant to the National Land Code may be deemed a "judgment", for the purpose of s. 6(3) of the Limitation Act 1953? (Leave question (2))

**Background Facts**

**[6]** Learned counsel for the plaintiff has set out the detailed background facts (which are largely undisputed) in her written submission, and we gratefully adopt the same *albeit* with some modifications.

**[7]** Bank Utama (M) Berhad had granted credit facilities in the sum of RM400,000 ("the facilities") to the defendant to finance the purchase of the said land. As security, the said land was charged under the National Land Code (NLC) to Bank Utama (M) ("the charge").

**[8]** Thereafter, Bank Utama (M) Berhad merged with/was acquired by the plaintiff. The facilities were also acquired by the plaintiff, who undertook the recovery action.

**[9]** As the defendant had defaulted in making payment under the Form 16D statutory demand dated 6 September 1999 in respect of the facilities and charge, the plaintiff filed the originating summons on 15 October 2001 and obtained the order for sale on 6 May 2002 (the order for sale).

**[10]** Pursuant to the order for sale, the defendant filed a summons for directions and the High Court fixed the first auction date on 29 March 2004. Thereafter, numerous attempts to auction the said land failed.

**[11]** On 14 August 2000, the defendant was adjudicated a bankrupt *vide* bankruptcy proceedings filed by a third party.

**[12]** Consequent upon the order for sale, the defendant had attempted to realise the said land *vide* 11 court-conducted auctions but they were all either aborted due to lack of bidders or were called off due to various applications filed by the defendant to stall the auctions fixed.

**[13]** On 9 March 2005, the defendant filed an application to set aside the order for sale ("the defendant's first application"). In this regard, the auction fixed for 3 May 2005 was called off by the court pending disposal of the defendant's first application. The application was subsequently dismissed by the High Court on 23 October 2010.

**[14]** Further attempts to auction the said land proved futile.

**[15]** On 5 January 2016, the defendant filed a stay application for the auction of 19 January 2016 to be cancelled on the ground that the defendant was prepared to settle his debt to the plaintiff and had applied for sanction from the Department of Insolvency for the same. This was the defendant's third application. In this regard, the auction was adjourned by the court to 17 March 2016.

**[16]** The defendant thereafter filed a further application (the defendant's fourth application) on 22 February 2016 to stay the auction dated fixed for 17 March 2016. The Deputy Registrar vacated that auction and fixed another auction date on 21 June 2016. However, this auction was aborted as there were no bidders.

**[17]** Further attempts to auction the said land on 20 September 2016 and 29 December 2016 were also unsuccessful as there were no bidders.

**[18]** On 8 March 2017, the plaintiff filed an application to fix a further auction date for the sale of the said land. The defendant then filed the present fifth application dated 11 April 2017 which sought to restrain further auctions and for a perpetual injunction to prevent the plaintiff from recovering any debts owed by him or to enforce the charge on the ground that the limitation period has set in (the defendant's fifth application).

**Proceedings In The High Court**

**[19]** The Deputy Registrar dismissed the defendant's fifth application and fixed a new auction date on 7 September 2017. However this date was aborted as there were no bidders.

**[20]** The High Court Judge dismissed the appeal against the Deputy Registrar's decision on 8 January 2018. In dismissing the appeal against the Deputy Registrar's decision, the learned judge found as follows:

> [18] Dalam kes ini, Borang 16D dikeluarkan pada 6-9-1999, memberi Defendan masa 7 hari untuk memperbetulkan (remedy) kemungkiran yang berlaku yang mana Defendan gagal berbuat demikian. Saman Pemula untuk perintah penjualan dan lelongan awam difailkan dalam tahun 2001 dan setelah perintah lelongan awam diperoleh, lelongan awam pertama telah dijadualkan pada 6-5-2001. Jelas di sini, Plaintif memfailkan Saman Pemula dan mendapat perintah lelongan dan jualan dalam tempoh masa 12 tahun yang dibenarkan.
>
> [19] Tidak dinafikan, semenjak dari tarikh lelongan awam pertama, beberapa lelongan awam lain telah diadakan tetapi hartanah tersebut tidak berjaya dijual dan ini memaksa Plaintif pada 18-5-2017 sekali lagi memohon mendapatkan tarikh untuk lelongan awam dijalankan. Walaupun begitu, *permohonan yang dibuat pada 18-5-2017 adalah sekadar bagi mendapat tarikh baru untuk satu lelongan awam dijalankan setelah lelongan awam yang dijalankan sebelum itu tidak berjaya. Permohonan Plaintif bukan untuk mendapat perintah lelongan dan jualan.* Perintah lelongan dan jualan telah pun diperoleh dalam tahun 2001. *Oleh itu Seksyen 21(2) Akta Had Masa 1953 tidak terpakai* dan tidak membantu Defendan. (emphasis added)

**Proceedings In The Court Of Appeal**

**[21]** On 5 July 2018, the Court of Appeal allowed the defendant's appeal. In allowing the appeal, the Court of Appeal considered only one issue. As the court described it:

> The issue before us was whether the plaintiff is barred from proceeding with the auction under section 21(1) of the Limitation Act.

**[22]** The court proceeded to hold that, based on the definition of the word "action" in s. 2(1) of the Limitation Act 1953 (Limitation Act), s. 21(1) therefore applies to the plaintiff's action to auction the said land. To quote the Court of Appeal:

> Given the clear definition of the word "action" which includes "proceeding" we agreed with the defendant that section 21(1) of the Limitation Act applies to the plaintiff's action to auction the property, such action is a proceeding in a court of law within section 2 of the Limitation Act. Taking the date of the order for sale, any action by the plaintiff to auction the property would be clearly beyond the twelve year period ...

The Court of Appeal was also of the view that the plaintiff's application would in any case, be caught by s. 6(3) of the Limitation Act.

## Our Decision

*Leave Question (1)*

**[23]** It was the plaintiff's contention that the word "action" in s. 21(2) of the Limitation Act 1953 (Limitation Act) refers to fresh actions. Applications filed to fix new auction dates, such as in the case here, were merely consequential proceedings taken to enforce and execute the order for sale and were not fresh actions. As such ss. 21(1) and 6(3) of the Limitation Act ought to have been held to be inapplicable to such applications which were for the continued auction for sale of the said land by the court.

**[24]** Learned counsel for the plaintiff further argued that s. 21(1) of the Limitation Act only applies to actions for recovery of monies and not to the exercise of a statutory right by a chargee under the NLC. Counsel cited several authorities in support of their proposition which we will advert to in the course of our discussion on this issue.

**[25]** To appreciate the plaintiff's submission, it is important that we examine ss. 21(1), 2 and 6(3) of the Limitation Act.

Section 21(1) stipulates as follows:

> **21. Limitation of actions to recover money secured by mortgage or charge or to recover proceeds of the sale of Land.**
>
> (1) **No action** shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued. (emphasis added)

Section 2(1) defines "action" in the following terms:

> "action" includes a suit or any other proceeding in a court of law.

Section 6(3) in turn provides that:

> (3) **An action** upon any judgment shall not be brought after the expiration of twelve years from the date on which the Judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

The Court of Appeal relied on the case of *Dato' Seri Anwar Ibrahim v. Tun Dr. Mahathir Mohamad* [2011] 1 CLJ 1; [2011] 1 MLJ 145 in construing the word "action" as defined in s. 2(1) above. According to the Court of Appeal:

> Guided by the above authority, while fixing of a new auction date by the court may be defined to be a progression of the plaintiff's originating summons, it is nevertheless a distinct and separate action requiring the respondent's application to court ... It clearly falls under "any proceeding in court of law".

**[26]** We will explain later why the Court of Appeal fell into error in relying on the Federal Court decision of *Dato' Seri Anwar Ibrahim* to arrive at its conclusion that since the word "action" in s. 2(1) of the Limitation Act includes any proceeding in a court of law then, by virtue of s. 21(2) thereof limitation would apply to the plaintiff's application.

**[27]** Thus the question arises whether the word "action" in s. 21(2) of the Limitation Act refers to fresh actions only or whether it includes any other proceeding in a court of law as held by the Court of Appeal.

**[28]** The plaintiff cited the English case of *Lowsley v. Forbes (t/a LE Design Services)* [1998] 3 All ER 897 in support of their contention that s. 21(2) read with s. 2(1) of the Limitation Act are meant to apply only to fresh actions and not applications to fix new dates of auction.

**[29]** In *Lowsley*, the court was concerned with the interpretation of s. 24(1) o the UK Limitation Act 1980, to determine whether execution proceedings brought against the defendant was time barred. The facts briefly were these. The plaintiffs obtained judgment by consent against the defendant in the sum of £70,000 in 1981. The defendant then left the country and the plaintiffs only managed to catch up with him some ten years later. They then attempted to enforce the judgment against him and sought to recover interest from the date of the judgment.

**[30]** The defendant argued that the claim was time barred by virtue of s. 24 of the UK Limitation Act 1980 and the definition of "action" in s. 38(1) of the UK Limitation Act 1980, which is similar to the definition of "action" in s. 2(1) of our Limitation Act.

**[31]** The House of Lords unanimously held that:

> "Action" in s. 24(1) means a **fresh action**, and does not include proceedings by way of execution. (emphasis added)

**[32]** The House of Lords' decision in *Lowsley* is significant because our Limitation Act (as with other Commonwealth countries including Singapore and New Zealand) is based substantially on the UK Limitation Act of 1939. As pointed out by learned counsel for the plaintiff, this Act was subsequently replaced by the UK Limitation Act 1980 but the provisions in the 1939 Act were largely consolidated with other UK statutes of limitation and preserved in the 1980 Act.

**[33]** As was also pointed out by learned counsel, except for the number of years prescribed as the limitation periods, s. 6(3) of our Limitation Act "largely mirrored" s. 24 of the UK Limitation Act 1980. We reproduce below ss. 24 and 38(1) of the UK Limitation Act:

> 24 (1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.
>
> (2) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.
>
> 38 (1) In this Act, unless the context otherwise requires – "action" includes any proceeding in a court of law, including an ecclesiastical court;

*Lowsley* (*supra*) was referred to and applied by this court in the recent case of *Gee Boon Kee & Ors v. Tan Pok Shyong* [2018] 1 CLJ 565; [2018] 1 MLJ 155.

**[34]** The issue before the court was whether limitation applied to bar an application by a party to have carriage of a decree of specific performance to completion. In deliberating whether s. 6(3) of the Limitation Act applied, this court held, after considering the English cases applicable on this issue:

> Based on the decision of the English cases that have been referred to earlier in this judgment, we are of the view that **the word "action" in sections 2(1) and 6(3) of the Limitation Act 1953 must mean a fresh action** and did not include an application to have carriage of a decree of specific performance to completion. (emphasis added)

**[35]** A similar view was expressed by the Court of Appeal in *Re Lim Ah Hee, ex p Perwira Affin Bank Bhd* [2000] 3 CLJ 354; [2000] 3 MLJ 211 as can be seen below:

> It was held by the House of Lords that on its true construction, **the word action in section 24(1) of 1980 Act means a fresh action and did not include proceedings by way of execution.** Accordingly, the section did not bar execution of a judgment after six years, but only barred the bringing of a fresh action on the judgment. (emphasis added)

**[36]** In affirming the Court of Appeal's decision, this court in *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787; [2004] 3 MLJ 253 held that s. 6(3) of the Limitation Act applied to a bankruptcy petition because:

> ... a bankruptcy proceeding is by way of petition, just like a divorce winding up or election, to name a few. Thus **a bankruptcy proceeding bears the characteristics of a fresh proceeding unlike an execution proceeding.**

**[37]** This court went on to say:

> A question then may be asked:
>
> ... is an "execution" not a "proceeding in court."
>
> Of course it is a proceeding in court but, I think, the distinction lies in the fact that *execution is the continuation of the existing proceeding to enforce the judgment provided by the same rules of court, the RHC.* On the other hand, *bankruptcy proceedings are provided by a separate law and rules, the focus being the judgment debtor, not the debt* ... (emphasis added)

**[38]** The position is the same in Singapore where "action" for purposes of limitation, has been construed to mean "fresh action". This can be seen in the case of *Teh Siew Hua v. Tan Kim Chong* [2010] 4 SLR 123 where, the High Court held that an application by the petitioner wife in 2009 to execute a judgment obtained against her husband in 1992 was not time barred.

**[39]** After considering *Lowsley* and other English cases on this issue, Steven Chong J (as he then was) held:

> On the basis of these authorities, I therefore decided that **the Petitioner's application was not "an action upon any judgment" within section 6(3) of the Act as it was not a "fresh action" brought on a judgment** in order to obtain a second judgment, and consequently was not barred after the lapse of 12 (or more years). (emphasis added)

**[40]** It should be noted that s. 6(3) of the Limitation Act (Chapter 163) of Singapore is in *pari materia* with our s. 6(3) of the Limitation Act.

**[41]** Thus, to answer the question posed earlier, it is very clear from the above authorities that the word "action" in s. 2(1) of the Limitation Act must mean fresh actions only and does not include applications filed procedurally in pursuance or in execution of the order for sale made in the main action.

**[42]** In this regard, we agree with learned counsel for the plaintiff that applications filed to fix new auction dates as in the present case were merely consequential proceedings taken to enforce and execute the order for sale and were not fresh actions. Sections 21(1) and 6(3) of the Limitation Act are therefore not applicable to such applications.

**[43]** The Court of Appeal's reliance on the *Dato' Seri Anwar Ibrahim* case was, with respect erroneous. The case itself is not concerned with the Limitation Act nor the interpretation of "action" as set out in s. 2 of the Limitation Act. Rather the issue before the court was whether a judgment formed part of the "proceedings" in an action.

**[44]** We should mention here that it is an undisputed fact acknowledged by the Court of Appeal that the plaintiff's originating summons to obtain the order for sale was filed within the 12 year limitation period.

**[45]** Despite acknowledging this fact, the Court of Appeal nevertheless found the application to enforce the order for sale (ie, to fix new auction dates) barred by ss. 21(1) and 6(3) of the Limitation Act based on its construction of the word "action" in s. 2(1) of the same, which construction as seen from the authorities cited above, is plainly incorrect.

**[46]** The various applications filed after the originating summons was heard and order for sale granted was clearly for the purpose of enforcing the order for sale. Those auction applications which must accord with the terms of the order for sale and the NLC would not be an enforcement of the charge but, at the risk of repeating ourselves, an enforcement of the order for sale and would therefore not be caught by the provisions of s. 21(1) of the Limitation Act.

*Leave Question (2)*

**[47]** This question has been partly addressed and answered in our answer to the first leave question.

**[48]** As alluded to earlier, the Court of Appeal had, in the course of holding that s. 21(2) of the Limitation Act applied to the plaintiff's action to auction the said land, expressed the following view:

> Such an action would, in any case, be caught by section 6(3) of the Limitation Act.

**[49]** Here too, we are inclined to agree with the plaintiff's submission. To recapitulate s. 6(3) of the Limitation Act provides that:

> An action **upon any judgment** shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest becomes due.

The law is well-settled on this matter as amply demonstrated by the following cases.

**[50]** In *Kandiah Peter v. Public Bank* [1993] 4 CLJ 332, the Supreme Court held that:

> **The Order for Sale when made under s. 256 of the code is not a judgment or a decree.** The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. (emphasis added)

**[51]** The Federal Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 expressed the same sentiments when it held:

> Further, **an order for sale made pursuant to s. 256 of the Code is not a judgment.** That was settled by the decision of the Court of Appeal in *Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd* [1988] 1 MLJ 257, where Seah SCJ speaking of an order for sale said (at p 258):
>
> > Here, there was no judgment debt. The claim of the appellant in the court below was in exercise of their statutory remedy against the respondent as chargor in default under the provisions of the National Land Code 1965. The appellant's claim was not under a covenant but under the registered charge. (emphasis added)

**[52]** In a more recent decision, *United Overseas Bank (Malaysia) Sdn Bhd v. Hanya Satu Tours & Travel Sdn Bhd* [2016] 1 LNS 116; [2016] 11 MLJ 102, the High Court in a case involving the sale of charged properties under s. 256 of the NLC considered the principles enunciated by the Federal Court in *Low Lee Lian* (*supra*) and made the following observation:

> … **an order for sale made pursuant to s. 256 of the NLC is not a judgment.** There is no judgment debt. The application by the chargee for the order for sale does not involve any commencement of an action but is instead pursued in exercise of the right to enforce the statutory remedy against the chargor in default under the provision of the NLC. (emphasis added)

**[53]** As established by the aforesaid cases, in particular *Kandiah Peter* and *Low Lee Lian*, an order for sale made under s. 256 of the NLC is not a judgment. The Court of Appeal was clearly misconceived when it sought to hold that s. 6(3) of the Limitation Act applied to the plaintiff's application to auction the said land.

**[54]** For completeness, we would like to reiterate what we have stated earlier in paras. [23] to [42] of our judgment that an "action upon a judgment" in s. 6(3) of the Limitation Act means a "fresh action" and not an application to auction a property or to fix a date of auction as in the present case, as they are merely proceedings to enforce the order for sale.

**[55]** Finally, the observation of the court in *Chung Khiaw Bank Ltd v. Lau Ah Yen & Anor* [1989] 1 CLJ 1065; [1989] 1 CLJ (Rep) 432; [1989] 2 MLJ 247 when construing the sale of a charged land is, in our view, apposite:

> This will be consistent with the provisions of s. 259(2)(c) wherein no power is reserved to the court 'to make such other order as it may think just.' It is my view that under this subsection when there is no bid at the second auction the court may order the land to be put up for auction for the third time. In fact **there is no limit as to the number of times the land can be put up for auction** and for each time the court may reduce the reserve price. (emphasis added)

## Conclusion

**[56]** In light of what we have stated above, we are constrained to answer both questions of law in the negative.

**[57]** The appeal is accordingly allowed with costs.

**[58]** We set aside the decision of the Court of Appeal and affirm the decision of the High Court.